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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARK HARRIS, Plaintiff and Respondent, v. LOCKER, LLC, Defendant and Appellant.	A135824 (Alameda County Super. Ct. No. RG-11-588790)

Locker, LLC filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16 (section 425.16) to strike the complaint for wrongful eviction filed by Mark Harris. Although Harris filed no opposition, the trial court believed the matter authoritatively resolved by *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281 (*Clark*), and denied the motion. We agree that *Clark*—and our own decision in a similar setting—are dispositive, and we affirm.

BACKGROUND

The first three paragraphs of Harris's in pro per amended complaint, styled "For Wrongful Eviction," explain the genesis of this dispute:

"Plaintiff lived at 1915 Essex St., a single-family residence, in Berkeley, California, from February 2005 until Locker, LLC, the owner of record, evicted him, stating that Plaintiff's tenancy was subject to the Berkeley Municipal Code (hereafter B.M.C.) 13.76. . . . The Complaint and Summons were dated September 29th, 2010, and peaceful possession was taken on May 5th, 2011. (See Exhibits A, B, C, and D.). Defendants' [*sic*] legal theory for the eviction was removal from the rental market by

demolition. Defendant signed and swore under penalty of perjury that 'the landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.' - B.M.C. 13.76.130A.8.

"It is a matter of public record that no permit was ever issued or even applied for. (See Exhibit F). No demolition has been done in the 20 weeks since possession was taken. Plaintiff is informed and believes that no demolition was ever contemplated or will ever be done and that the eviction was willfully false and in bad faith.

"B.M.C. 13.76.150B . . . states that 'If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possession under 13.76.130A.8 is not initiated within two months after the tenant vacates the unit, or it is shown the landlords' [*sic*] claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlords' conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages, whichever is greater.' Therefore Defendant had until July 15th 2011 to begin demolition. . . ."

Harris further alleged that the Berkeley Municipal Code entitled him to regain his tenancy, unpaid "relocation assistance," and attorney fees. The final cause of action was for "mental anguish" resulting from the eviction. Five relevant exhibits were attached to Harris's complaint: Locker's unlawful detainer complaint; the entry of Harris's default; entry of judgment for Locker in the unlawful detainer action; the writ of possession; and what appears to be a City of Berkeley "Notice of Intent To Withdraw Accommodations From Rent Or Lease (BMC Section 13.77.050.A.1)" form.

Locker answered Harris's complaint and then filed a motion to strike that complaint pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute. Harris filed no opposition beyond asking the court to take judicial notice of various documents in the unlawful detainer proceeding. At the hearing requested by Locker to argue the tentative ruling to deny its motion (at which Harris did not appear), the court heard counsel for Locker attempt to distinguish *Clark* (which the court had apparently

found in its own research). The court told Locker's counsel that *Clark* "is almost on all fours," and that the tentative decision was "based on your inability to meet prong one. I never got to prong two."

The court then entered an order, the pertinent language of which reads: "The tentative ruling is affirmed as follows: Defendant Locker LLC's unopposed Special Motion to Strike First Amended Complaint for Wrongful Eviction is DENIED. Defendant has not made a threshold showing that the plaintiff's claims arise from defendant's free speech or petition activity as specified in C.C.P. section 425.16, subds. (b), (e). See, e.g., *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286, 1289-1290 (tenant's claims were not premised on the landlord's protected activity of prosecuting an unlawful detainer action, but on the claim that landlord removed the apartment from the market and fraudulently evicted the tenant to install a family member who never moved in); *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 157-160 (lawsuit seeking a declaration of rights under the Ellis Act did not arise from the landlord's filing of an Ellis Act notice, even though it was not triggered by that filing)." Locker perfected this timely appeal from the order.

REVIEW

Anti-SLAPP Law and the Standard of Review

We recently explained the operation of section 425.16, in both the trial and reviewing courts:

"Subdivision (b)(1) of section 425.16 provides that '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' Subdivision (e) elaborates the four types of acts within the ambit of a SLAPP, including, as pertinent here, '(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'

"A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]

" 'The Legislature enacted section 425.16 to prevent and deter "lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target' " [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.' [Citation.]

"Finally, and as subdivision (a) of section 425.16 expressly mandates, the section 'shall be construed broadly.'

"With these principles in mind, we turn to a review of the issues before us, a review that is de novo. [Citation.]" (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463-464.)

Application of Section 425.16

In *Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940—which is not cited by either party in their briefs—we examined the two decisions cited by the trial court here, and virtually all the relevant cases on this point[1]:

[1] The only relevant precedent subsequent to *Delois* is *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, where it was held that a cause of action for wrongful eviction based on alleged noncompliance with a municipal rent control did not involve protected conduct or communication within the meaning of section 425.16.

"[In] *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, . . . after the landlords had served notice under the Ellis Act (Gov. Code, § 7060 et seq.)[2] that they intended to withdraw certain rental units from the market, the tenants of some of those units brought a declaratory relief action to clarify their rights under that statute. The landlords filed an anti-SLAPP motion, contending that the tenants' complaint arose from the landlords' action in filing and serving the Ellis Act notices, and from other litigation involving the removal of the rental property from the market. The trial court granted the SLAPP motion, thereby striking the tenants' cause of action and dismissed their declaratory relief action.

"The Court of Appeal disagreed with the trial court that the SLAPP motion was appropriate and reversed its order. After quoting the key language from section 425.16(a), the court wrote: 'Even if we assume filing and serving the Ellis Act notice and the notice to vacate constituted protected petitioning or free speech activity "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." Rather, the critical question in a SLAPP motion "is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." [¶] Defendants have fallen victim to the logical fallacy post hoc ergo propter hoc—because the notices preceded plaintiffs' complaint the notices must have caused plaintiffs' complaint. The filing and service of the notices may have triggered plaintiffs' complaint and the notices may be evidence in support of plaintiffs' complaint, but they were not the cause of plaintiffs' complaint. Clearly, the cause of plaintiffs' complaint was defendants' allegedly wrongful reliance on

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[2] "The Ellis Act permits owners of property subject to rent control to evict their tenants and go out of business if they comply with certain procedural requirements." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 18.) The Ellis Act is never cited in Harris's complaint, or cited in his brief as applicable to his situation. We further note that Division Four of this District held that a municipal ordinance which provides for "reasonable relocation assistance compensation for displaced tenants does not violate the Ellis Act." (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 893.)

the Ellis Act as their authority for terminating plaintiffs' tenancy. Terminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech.' (*Marlin, supra,* 154 Cal.App.4th at pp. 160–161, fns. omitted).

"In January 2009, perhaps the most pertinent of the appellate decisions discussing the application (or lack thereof) of the SLAPP statute to landlord-tenant disputes was published. It is *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281 (*Clark*).[3] There, as here, a tenant sued her landlord for fraud and unlawful eviction after the landlord evicted her, allegedly to make the rental unit available to the landlord's daughter; the latter never happened. The trial court granted the landlord's SLAPP motion, holding that the tenant's complaint was essentially based on the landlord's privileged communications. Again, the Second District reversed. In so doing, it held that although '[t]here is no question that the prosecution of an unlawful detainer action is indisputably protected activity within the meaning of section 425.16,' on the facts before it, the tenant's complaint was 'not premised on Mazgani's protected activities of initiating or prosecuting the unlawful detainer action, but on her removal of the apartment from the rental market and fraudulent eviction of Clark for the purpose of installing a family member who never moved in.' (*Clark, supra,* 170 Cal.App.4th at p. 1286.)

"Quoting *Marlin,* the *Clark* court continued: ' "Terminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the

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[3] When the trial court described *Clark* as "almost on all fours" with this case, it was not indulging in hyperbole. Notice the profound similarities with how the *Clark* court opened its opinion: "A landlord successfully evicted a long-term tenant from a rent-controlled apartment, ostensibly to free the unit for occupancy by the landlord's daughter. The landlord's daughter never moved in, and the tenant sued the landlord for fraud and unlawful eviction and failure to pay relocation expenses. The landlord responded with a special motion to strike (Code Civ. Proc., § 425.16), arguing the tenant's complaint arose from the landlord's acts or statements in furtherance of her constitutional rights. The trial court agreed, and granted the motion. We conclude the tenant's claims did not arise from a protected activity—they are based on the landlord's violation of rent control laws, not on actions in furtherance of the right of free speech or petition. Accordingly, we reverse." (*Clark, supra,* 170 Cal.App.4th 1281, 1284.)

constitutional rights of petition or free speech." [Citations.] " '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' " [Citation.] The pivotal question " 'is whether the cause of action is based on the defendant's protected free speech or petitioning activity.' " [Citations.]' (*Clark, supra,* 170 Cal.App.4th at pp. 1286–1287, italics omitted.)

"The *Clark* court then discussed the facts and rulings of both *Marlin* and *DFEH* [*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273] and held: 'The same reasoning applies here. Clark's action against Mazgani is not based on Mazgani's filing or service of the notices of intent to evict, it is not based on anything Mazgani said in court or a public proceeding, and it is not based on the fact that Mazgani prosecuted an unlawful detainer action against her. The complaint is based on Mazgani's allegedly unlawful eviction, in that she fraudulently invoked the [rent ordinance] to evict Clark from her rent-controlled apartment as a ruse to provide housing for her daughter, but never installed her daughter in the apartment as required by that ordinance, and also that she failed to pay Clark's relocation fee.' (*Clark, supra,* 170 Cal.App.4th at p. 1288.)

"Because the landlord in *Clark* relied on our decision . . . in *Feldman* [*v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467] and also on *Birkner v. Lam* (2007) 156 Cal.App.4th 275 (*Birkner*), the *Clark* court distinguished those cases: 'In *Birkner,* tenants sued their landlord for wrongful eviction in violation of San Francisco's rent control ordinance, negligence, breach of the covenant of quiet enjoyment and intentional infliction of emotional distress. [Citation.] The sole basis for liability was the landlord's service of an eviction notice and his refusal to rescind it after the tenants informed him they were exempt from eviction based on age and length of tenancy. The Court acknowledged the rule articulated in *Marlin,* that terminating a tenancy or removing a property from the rental market does not constitute an activity taken in furtherance of the constitutional right of petition or free speech. [Citation.] But, it found the circumstances of *Marlin* distinct. In *Marlin,* the tenants' claims were based on their

contention that the landlord was not entitled to rely on the Ellis Act to evict them. In contrast, in *Birkner,* the gravamen of the complaint was the landlord's service of the eviction notice under the rent ordinance and his refusal to rescind it, activities indisputably protected under the anti-SLAPP statute. [Citation.] [¶] In *Feldman* [citation], tenants refused to vacate an apartment after the landlord demanded higher rent. The landlord filed an unlawful detainer action. The tenants filed a cross-complaint alleging retaliatory eviction, negligence, negligent misrepresentation, breach of the covenant of quiet enjoyment, wrongful eviction, breach of contract and unfair business practices. The unlawful detainer action was dismissed, and the landlord moved to strike the cross-complaint as a SLAPP suit. The Court of Appeal [i.e., this court] found that, with the exception of the claim of negligent misrepresentation, the tenants' cross-complaint was based on the filing of the unlawful detainer action, service of the notice to quit, and statements made by the landlord's agent in connection with the threatened unlawful detainer. Those activities were not merely evidence of the landlord's wrongdoing or activities which 'triggered' the filing of an action that arose out of some other independent activity. On the contrary, as was the case in *Birkner,* they were the challenged activities and the bases for all but one cause of action. [Citation.]' (*Clark, supra,* 170 Cal.App.4th at pp. 1288–1289.)

"The *Clark* court then summed up the critical distinction between the facts before it and those before us in *Feldman* and the court in *Birkner:* 'The pivotal distinction between the circumstances in *Marlin* . . . on one hand, and *Birkner* and *Feldman* on the other, is whether an actual or contemplated unlawful detainer action by a landlord (unquestionably a protected petitioning activity) merely "preceded" or "triggered" the tenant's lawsuit, or whether it was instead the "basis" or "cause" of that suit.' (*Clark, supra,* 170 Cal.App.4th at p. 1289.)" (*Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 950-953, fns. omitted.)

This last sentence is explained by the trio of decisions that came from our Supreme Court in 2002. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman* (2002)

29 Cal.4th 69, 76-77.) " ' "[T]he act underlying the plaintiff's cause" or "the act which forms the basis for the plaintiff's cause of action" must *itself* have been an act in furtherance of the right of petition or free speech.' (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) "[T]hat a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

True, as noted in *Delois*, Locker's notice to Harris to quit the premises and the unlawful detainer complaint do qualify—in the abstract—as protected activity. But our de novo review of Harris's complaint discloses that its gravamen is Locker's alleged numerous and sundry violations of Berkeley's Rent Stabilization and Eviction for Good Cause Ordinance. In other words, using the language of *Delois*, Locker's protected activity may have "triggered" Harris's lawsuit, but it does not constitute the "basis" of that lawsuit.

Harris's claim that Locker allegedly violated the Berkeley law with a bogus and fictitious demolition can stand independently of Locker's unlawful detainer action. The same municipal ordinance which provides that Harris was, according to his computation, entitled to $16,200 of relocation assistance does not condition that entitlement to prosecution of an unlawful detainer action. The terms of the Berkeley law paraphrased in Harris's complaint and the "Notice of Intent To Withdraw Accommodations From Rent Or Lease (BMC Section 13.77.050.A.1)" form clearly extend that entitlement to treble damages and attorney fees, which is predicated only on the landlord's noncompliance with the duty to deposit relocation assistance funds at the time the notice is filed with the city.[4] That noncompliance does not require the landlord to commence an unlawful

[4] "The tenants of any residential rental unit who are required to move as a result of the owner's withdrawal of the accommodation from rent or lease shall be entitled to a relocation payment . . . from the owner." (Berkeley Mun. Code, § 13.77.055(A).) "At

detainer action, but may be established if the tenant voluntarily quits the premises (as occurred in *Delois*: see 177 Cal.App.4th at p. 955). In short, Locker's alleged violations of the Berkeley laws allegedly occurred before and after it filed the unlawful detainer action against Harris. Our de novo review demonstrates that the Locker's unlawful detainer action was not the "basis" or "cause" of Harris's subsequent wrongful eviction suit.

Understandably, Locker places its major reliance on *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, where Division Five of this District held that a cause of action for wrongful eviction based on a landlord's alleged noncompliance with a municipal rent control ordinance involved speech and petitioning activity that were protected by section 425.16. However, the underlying force of the analysis is considerably weakened by not addressing *Delois* and by its conclusory discussion of *Clark* in a footnote. (*Wallace v. McCubbin, supra,* 196 Cal.App.4th at p. 1192, fn. 10.) We continue to believe that *Clark* and *Delois* have the sounder rationale.

Locker also detects procedural and substantive defects in the trial court's ruling. Procedurally, Locker points to Harris's failure to offer evidence in support of his claims. But there was no evidentiary burden or obligation on Harris unless and until Locker carried its initial burden, which it did not. (*Birkner v. Lam*, *supra*, 156 Cal.App.4th 275, 280-281; *Ross v. Kish* (2006) 145 Cal.App.4th 188, 197.) Substantively, Locker asserts that it is entirely protected by the litigation privilege of Civil Code section 47. But the foregoing has already established that the basis of Harris's complaint is not limited to Locker's official filings. "The anti-SLAPP statute and the litigation privilege are coextensive. . . . [¶] [I]f the statements and communications do not qualify for protection under section 425.16 . . . then the litigation privilege is similarly inapplicable . . . ." (*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC*, supra, 154 Cal.App.4th 1273, 1288, fn. 23.) Lastly, Locker contends that the judgment

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the time of filing the notice of intent . . . , the owner shall deposit the relocation payments specified in subparagraph A above into escrow with the City." (*Id.*, § 13.77.055(B).)

entered on Harris's default in the unlawful detainer action prove that "Harris' claims are barred by the doctrines of claim and issue preclusion." The sole issue in an unlawful detainer action is possession of the premises. (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 159; *Berry v. Society of Saint Pius X* (1999) 69 Cal.App.4th 354, 363.) The range of Harris's claims is, as already shown, far wider than that.

DISPOSITION

The order is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.